Supreme Court, U.S.
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No. 01-1473

IN THE

Supreme Court of the United States

HUNT TRUCK LINES, INCORPORATED,
AN IOWA CORPORATION,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
AND HOWARD MCDOUGALL, TRUSTEE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petitioner Hunt Truck Lines, Incorporated ("Hunt") has waived its argument that the Seventh Circuit should have applied the "five factor" test in resolving Hunt's claim for attorney fees pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), by failing to argue before the Seventh Circuit that there is any difference between the "five factor" test and the "special circumstances" test that the Seventh Circuit applied?

2. Whether the Seventh Circuit correctly construed the attorney fee provision of ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), where it presumed that an award of attorney fees to the prevailing party (*i.e.*, Hunt) would be proper unless the losing party's position was "substantially justified," or "special circumstances make a fee award unjust" (Petitioner's Appendix, p. 5a), and the Seventh Circuit interpreted this legal standard as "making the same basic point" (*Id.*) as the "five factor" test now urged by the Petitioner before this Court?

3. Whether the Seventh Circuit correctly held that the district court's failure to follow Seventh Circuit precedent was an abuse of discretion?

CORPORATE DISCLOSURE

None of the Respondents has a parent corporation, and no public company owns stock in any corporation which is a Respondent.

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CENTRAL STATES, SOUTHEAST AND
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JURISDICTION

The judgment of the court of appeals was entered on December 3, 2001. A petition for rehearing was denied on January 4, 2002. The petition for a writ of certiorari was filed on April 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), included in Appendix A hereto.

STATEMENT OF THE CASE

The Pension Fund brought this case as a claim for "interim payments" of statutory pension withdrawal liability. The Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.*, contains a provision requiring employers who have been notified of a withdrawal liability assessment by a multiemployer pension plan to commence payment of the assessment immediately, even if the employer wants to dispute the pension plan's assessment. 29 U.S.C. § 1401(d). MPPAA creates a mandatory arbitration procedure for resolving withdrawal liability disputes, but the employer must "pay now, and dispute later." *See, e.g., Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing Corp.*, 207 F.3d 500, 505 (8th Cir. 2000); *Galgary v. Beaverbrook Coal Company*, 105 F.3d 137, 139 (3d Cir. 1997); *Chicago Truck Drivers Pension Fund v. Rentar Indus., Inc.*, 951 F.2d 152, 154-55 (7th Cir. 1991). To the extent the employer prevails in arbitration, it will be entitled to a refund of the interim payments of withdrawal liability it has made. *Id.*

The district court denied the Pension Fund's claim to recover the interim withdrawal liability payments requested under the initial notice and demand for payment issued to Hunt in this case. (Petitioner's Appendices ("App."), p. 84a.) The Seventh Circuit affirmed this ruling on the grounds that, in its view, the Pension Fund had eventually admitted that its initial notice and demand for payment of withdrawal liability was six weeks premature, *i.e.*, the Pension Fund had issued the demand for payment of withdrawal liability six weeks before Hunt had incurred a withdrawal. ("*Hunt I*," Petitioner's App., pp. 67a-68a.) The Pension Fund had contended that the issue of prematurity of the withdrawal liability assessment (whether ultimately conceded by the pension plan or not) was simply an issue that went to *merits* of the withdrawal liability dispute, and did not justify a deflection

from the "pay now, dispute later" procedure mandated by the statute. (Petitioner's App., p. 66a.) Nevertheless, in *Hunt I* the Seventh Circuit laid down a new rule whereby a claim for interim withdrawal liability payments should be denied if, prior to adjudication of the interim payment issue, the pension plan admits that its demand for payment was in any respect premature. (Petitioner's App., p. 68a.) This differed from the prior rule established under Seventh Circuit case law; that case law only excused the employer from interim payments if the employer could show (1) that the pension plan's withdrawal liability assessment was frivolous or "non-colorable," *and* (2) that the employer would be irreparably harmed by making the interim payments. (Petitioner's App., p. 8a.)

However, in *Hunt I*, the Seventh Circuit also noted that although it was excusing Hunt from payment of the Pension Fund's *initial* notice and demand, Hunt would be required to make payments under a *revised* notice and demand. (Petitioner's App., p. 71a.) The revised notice and demand was in the same amount as the initial notice, but there was a slight difference in the timing of the payments. (*Id.*, p. 65a.)

ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), provides that attorney fees may be awarded to an employer who prevails against a pension plan in an action of this type. Upon remand from the Seventh Circuit in *Hunt I*, Hunt petitioned for fees under this statute. The district court noted that the Seventh Circuit uses two formulations of the legal test to determine whether to grant a fee award of this type: The "five factor" test (discussed at length in the Petition in this case, p. 11 *et passim*), and the "substantially justified" or "special circumstances" test. (Petitioner's App., pp. 12a-13a.) Under the latter test there is a presumption that the prevailing party is entitled to an attorney fee award, unless the losing party's position was not "substantially justified," or there are "special circumstances" that would make an award of fees unjust. (*Id.*)

The district court noted that these two formulations were "essentially the same." (Petitioner's App., p. 12a.) As the district court also observed, neither party raised any issue concerning the applicable legal standard. (Petitioner's App., p. 11a.)

The district court concluded that Hunt should be awarded attorney fees under *both* the "five factor" test and the "special circumstances" test. (Petitioner's App., p. 13a.) The district court reasoned that fees "are warranted largely because Central States was culpable in 'jumping the gun' and prematurely issuing the Notice and Demand." (*Id.*)

The Pension Fund appealed. As in the district court, Hunt did not raise any issue on this appeal concerning the controlling legal standard. Nor did Hunt argue in the Seventh Circuit that it made any difference whether the court used the "five factor" test as opposed to the "special circumstances" test. (Hunt's Brief on Appeal in *Hunt II*, Appendix B hereto, pp. 14a-25a.)

The Seventh Circuit applied the "abuse of discretion" standard of review (Petitioner's App., p. 5a) and reversed the district court's decision to award attorney fees to Hunt ("*Hunt II*," Petitioner's App., p. 10a). In reaching this decision in *Hunt II*, the Seventh Circuit reiterated its view that there was no essential difference between the "five factor" test and the "special circumstances" test. (*Id.* at 5a.) The Seventh Circuit also concluded that there were "special circumstances" overlooked by the district court which made an award of fees in favor of Hunt unjust. Despite the clear directive in *Hunt I* that Hunt would be required to pay under the *revised* notice and demand from the Pension Fund, Hunt had persisted in ignoring this directive. From this the Seventh Circuit concluded that "an award of fees [to Hunt] would do nothing but encourage the very foot-dragging and

avoidance of interim payment liability that the statute was designed to prevent, and thus would be 'unjust.'" (Petitioner's App., p. 6a.)

In *Hunt II*, the Seventh Circuit also concluded that the district court erred in ruling that the Pension Fund had no legitimate justification for the position it took in *Hunt I* and was acting in bad faith. The Seventh Circuit noted that *Hunt I* presented a novel fact pattern and produced a new legal standard for resolving withdrawal liability interim payments cases in the Seventh Circuit. Prior to *Hunt I*, the Seventh Circuit had held that an employer who wished to defeat an interim payments claim had to show (1) that the pension plan did not even have a colorable withdrawal liability claim on the merits, *and* (2) that the employer would suffer irreparable harm by being forced to comply with the interim payments schedule. (Petitioner's App., p. 7a.) *Hunt II* noted that *Hunt I* introduced a new legal standard by jettisoning the requirement for a showing of irreparable harm where the pension plan had by implication conceded that its payment demand was in any respect premature. (*Id.*) Hunt had never made a showing of irreparable harm, and therefore under the pre-*Hunt I* legal standard, the Pension Fund argued that—for this reason alone—it had presented a position that was at least "substantially justified." (*Id.* at 8a.) In *Hunt II*, the Seventh Circuit noted that the district court's opinion on the attorney fee issue had failed to account for this change in the legal landscape affected by *Hunt I*. (*Id.* at 7a.)

Hunt filed a petition for rehearing with the Seventh Circuit in *Hunt II*. (Petitioner's App., p. 31a.) However, Hunt's petition for rehearing did *not* argue that the Seventh Circuit erred because it applied the "special circumstances" test, as opposed to the "five factor" test. Hunt's Petition for Rehearing, like Hunt's Brief, assumed that these two formulations of the legal standard were equivalent. (*Id.*) Nor did Hunt's

Petition for rehearing suggest that the Seventh Circuit had in any manner diverged from other Circuits in its use of the "special circumstances" test. (*Id.*)

ARGUMENT

I. HUNT HAS WAIVED ITS ARGUMENT THAT IT WOULD HAVE PREVAILED UNDER THE "FIVE FACTOR" TEST.

At no point during the district court proceeding concerning attorney fees or the appeal in *Hunt II* did Hunt advance the argument that it is now making this Court, *i.e.*, that there is a difference between the "five factor" test and the "special circumstances" test, and that this difference is outcome determinative in this case. The issue of the difference (if any) between the "five factor" test and the "special circumstances" test was simply not raised or litigated in any way in the courts below. As the district court observed, "[t]he parties agree on the applicable standards." (Petitioner's App., p. 11a.) Therefore, Hunt should be deemed to have waived its argument, advanced for the first time in its Petition before this Court, that there is a significant difference between the two formulations of the legal standard for an attorney fee award under 29 U.S.C. § 1132(g)(1). *See, e.g., United States v. Pedro Alvarez-Sanchez*, 511 U.S. 350, 360 n. 5, 114 S.Ct. 1599, 1605 n. 5 (1994) (Supreme Court refuses to review a claim that was waived below); *Granifinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39, 109 S.Ct. 2782, 2788-8 (1989).

II. THERE IS NO MEANINGFUL CONFLICT IN THE CIRCUITS ON THE ISSUE NOW RAISED BY HUNT.

Hunt's petition for a writ of certiorari asserts that "the opinion [of the district court] demonstrated that the district court used the five factor test." (Petition, p. 22, n. 5.) In fact, the district court used the "five factor" test and the "special

circumstances" test interchangeably; the court expressed its view that it simply did not make any difference which test was employed. (Petitioner's App., p. 13a.) The district court, like Seventh Circuit, viewed the two tests as essentially the same. (Petitioner's App., p. 4a, p. 12a.)

And Hunt's petition has not shown that there is any significant difference between the two tests, or that any such difference would have affected the outcome in this case. As the Seventh Circuit explained in *Hunt I*:

> We think these two formulations are alternative ways of making the same basic point: as we have put it before, "the bottom-line question is . . . .: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent."

(Petitioner's App., p. 5a (citation omitted).) To the extent there is any difference between the two tests, that difference *favored* Hunt. The "special circumstances" test gave Hunt (as the prevailing party in an ERISA case) the benefit of a presumption that it was entitled to attorney fees. Only if the Pension Fund could show that (1) its position was substantially justified in the underlying litigation, or (2) that there were other special circumstances making a fee award unjust, could the Fund rebut the presumption in favor of fees. Hunt is in no position to argue that the Seventh Circuit erred by applying a test that was overly indulgent to Hunt itself.

Given that there is no perceptible difference between the "special circumstances" test and the "five factor" test, at least as applied to the facts in this case, there is no conflict among the circuits. The Seventh Circuit's opinion in this case did not recognize that there was any such conflict, and that court saw the different verbal formulations of the legal standard as essentially reconcilable. Hunt is now asking this Court to fix something that isn't broken, and to resolve a non-issue.

III. THE SEVENTH CIRCUIT CORRECTLY APPLIED THE "ABUSE OF DISCRETION" STANDARD.

In this case the Seventh Circuit clearly acknowledged that it was reviewing the district court's attorney fee award under the "abuse of discretion" standard. (*Hunt II*, Petitioner's App., p. 5a.) Further, the Seventh Circuit correctly applied that standard.

First, the Seventh Circuit noted that the district court had made a legal error in its interpretation of Seventh Circuit case law. In analyzing the question of whether the Pension Fund's claim for interim withdrawal liability payments was "substantially justified" at the time it was originally brought, the district court failed to recognize that in *Hunt I* the Seventh Circuit was laying down a *new* rule of decision. (*Hunt II*, Petitioner's App., p. 8a.) Under pre-*Hunt I* case law, it appeared that the Pension Fund should have prevailed, if only because Hunt had failed to show that it would be irreparably harmed by complying with the interim payment schedule. (*Id.*) Therefore, the Seventh Circuit identified a significant error in the district court's legal reasoning. This constituted an abuse of discretion on the part of the district court. *See, e.g., Cooter & Cell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2461 (1990) (discretion abused on erroneous view of law).

The Seventh Circuit also noted that the district court had failed to consider the significance of the fact that Hunt not only ultimately had a withdrawal liability payment obligation in the same principal amount initially claimed by the Pension Fund, but that Hunt had steadfastly refused to satisfy this obligation. (*Hunt II*, Petitioner's App., p. 6a.) "The failure to consider an important factor or to make a record of having considered it constitutes an abuse of discretion." *Rashtabadi v. INS*, 23 F.3d 1562, 1571 (9th Cir. 1994). *See also Van*

Fossen v. Dept. of Housing and Urban Dev., 798 F.2d 1579, 1580 (Fed. Cir. 1984) (failure to consider important circumstance is an abuse of discretion).

Therefore, the Seventh Circuit applied well settled standards in determining that the district court had abused its discretion in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

29 U.S.C. § 1132. Civil enforcement

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 00-3922

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD MCDOUGALL, trustee,
Plaintiffs-Appellants,

v.

HUNT TRUCK LINES, INCORPORATED,
An Iowa corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,Eastern Division.
No. 96 C 5634
John A. Nordberg, Judge

BRIEF OF APPELLEES

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NO ORAL ARGUMENT REQUESTED

March 1, 2001

DISCLOSURE STATEMENT

The undersigned, as counsel for the Defendant-Appellee, furnishes the following responses in compliance with Seventh Circuit 26.1:

1. The undersigned represents Hunt Truck Lines, Inc.

2. The names of the law firms whose partners or associates have appeared for Hunt Truck Lines, Inc. in the case or are expected to appear in this court are: Thiemann Aitken & Vohra, LLC and McBride Baker & Coles.

3. Not applicable.

_____

Hervey H. Aitken
Attorney for Defendant-Appellee

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STATEMENT CONCERNING ORAL ARGUMENT PURSUANT TO CIRCUIT RULE 34(f)

Defendant-Appellee, Hunt Truck Lines, Inc., pursuant to Circuit Rule 34(f), respectfully submits that oral argument is not appropriate in this case and would not assist the Court's decisional process. Federal Rule of Appellate Procedure 34(a)(2) provides that a Court may disallow oral argument if a panel of three judges agrees that oral argument is unnecessary for any of the following reasons: (1) the appeal is frivolous; (2) the dispositive issues have been authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. This is one of those rare instances where all three reasons apply.

First, Central States' appeal of Judge Nordberg's award of attorneys' fees to Hunt is frivolous because Judge Nordberg rejected all of Central States' arguments to this Court, because Judge Nordberg did not abuse his discretion, and because Central States' legal arguments are meritless and are not well-grounded in the law. Additionally, Central States' appeal is frivolous where Central States was a party to the case of *Central States Southeast and Southwest Areas Pension Fund v. Nitehawk Express, Inc.*, 223 F.3d 483 (7th Cir. 2000), wherein this Court just last year held that an award of attorneys' fees to the prevailing party in an interim payments case was justified and within the district court's discretion despite the ultimate outcome of the withdrawal liability case.

Second, Judge Nordberg authoritatively decided the dispositive issues in this case. Judge Nordberg fully considered Central States' arguments opposing Hunt's motion for attorneys' fees, and thoroughly reviewed the facts of the case, including the extensive billing statements of counsel. After considering the relevant tests, Judge Nordberg determined that Central States' position in the litigation was not substantially justified and that Hunt was entitled to its attorneys'

fees and costs. Judge Nordberg also found that Central States' engaged in culpable conduct in the underlying litigation.

Third, the facts and legal arguments are adequately presented in the briefs and record, and the Court's decisional process, under an abuse of discretion standard, would not be aided by oral argument.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants' jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by awarding Hunt its attorneys' fees?

2. Whether the attorneys' fees awarded to Hunt are reasonable?

STATEMENT OF THE CASE

This is an appeal from an Order of the district court (Order, District Judge John A. Nordberg, *Central States, et al. v. Hunt Truck Lines, Inc.*, 96 C 5634, entered October 26, 2000), which ordered Central States to pay Hunt Truck Lines, Inc. ("Hunt") $44,120 in attorneys' fees and $105. 49 in non-taxable costs on the first fee request; to pay Hunt $73,032 in attorneys' fees, $1,505.82 for computerized legal research, and $1,358.92 in non-taxable costs on the second fee request; and to pay Hunt $2,400 in attorneys' fees on the third fee request. Short Appendix attached to Brief of Appellants, page 02, hereinafter cited as "S.A. at __." The first fee request relates to the litigation in the district court. S.A. at 04. The second fee request consists of two parts: (i) fees relating to the appeal, and (ii) fees relating to the preparation of the first two fee requests. S.A. at 06. The third fee

request relates to fees for preparing a supplemental response memorandum to Appellants' supplemental memorandum. S.A. at 13.

On or about May 25, 1994, Hunt sold its assets to Wintz Parcel Drivers, Inc. ("Wintz"). S.A. at 34. Under Section 4204 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1384, Hunt would only incur secondary withdrawal liability to Central States if, within five years of the sale of assets, Wintz made a withdrawal and then failed to make withdrawal liability payments. S.A. at 34.

On September 5, 1996, Central States filed an action seeking interim withdrawal liability payments from Hunt pursuant to ERISA Sections 502(a)(3) and 4301, 29 U.S.C. §§ 1132(a)(3) and 1451(a)(1), claiming that Wintz had withdrawn from Central States and that Hunt was therefore secondarily liable. S.A. at 34. The case was assigned to Judge Nordberg, and the parties filed cross-motions for summary judgment. *Id.*

After approximately 28 months of litigation, on January 12, 1999, Judge Nordberg granted Hunt's motion for summary judgment holding that Central States was not entitled to collect interim withdrawal liability payments because it had violated the jurisdictional prerequisites of the MPPAA by issuing a Notice and Demand for Payment of Withdrawal Liability to Hunt before a complete withdrawal by Wintz had occurred. S.A. at 33-38.

Shortly thereafter Hunt filed a motion before Judge Nordberg for attorneys' fees and costs, which, pursuant to ERISA section 502(g)(1), 29 U.S.C. § 1132(g)(1), may be awarded to either party in the court's discretion. S.A. at 03. On September 24, 1999, Judge Nordberg found that attor-

neys' fees were warranted. S.A. at 03-19. Judge Nordberg then directed the parties to brief the appropriate amount of fees to be awarded. S.A. at 19.

Meanwhile, on February 28, 2000, the Court of Appeals in a *de novo* review, affirmed Judge Nordberg's order and reasoning in granting Hunt's motion for summary judgment. S.A. at 20-26. Thereafter, Hunt filed its second fee request, which sought fees related to the appeal and to the preparation of the first two fee requests. S.A. at 04. Central States filed a response brief. S.A. at 07. Subsequently, Central States filed a motion for leave to file a supplemental brief. S.A. at 12. The district court granted Central States' motion and allowed Hunt to file a supplemental response. S.A. at 12.

On October 26, 2000, in a detailed 12-page decision, Judge Nordberg entered an Order awarding Hunt a cumulative $122,522.23 in attorneys' fees and costs for the three separate fee requests. S.A. at 03-14. Judgment was entered on October 31, 2000. S.A. at 01. Central States filed a notice of appeal on November 6, 2000, and that appeal is now before this Court.

STATEMENT OF FACTS

On or about May 25, 1994, Hunt sold its assets to Wintz. S.A. at 34. This sale of assets satisfied the criteria for such sales under 29 U.S.C. § 1384 and did not constitute a withdrawal from Central States. *Id.* On or about May 31, 1996, Central States issued a Notice and Demand for Payment of Withdrawal Liability to Hunt. *Id.* However, it was not until well after a month later—on or about July 27, 1996—that Wintz made a complete withdrawal from Central States within the meaning of 29 U.S.C. §1383. *Id.* Indeed, as represented in an Affidavit of Harry Keil, the Manager for Delinquent Accounts at Central States, dated February 13, 1997, and submitted to the district court in support of Central States' motion for summary judgment, Central States

determined that Wintz withdrew from Central States on or about July 20, 1996. Supplemental Appendix of Appellants previously filed with this Court in case number 99-1273 at page 25 (hereinafter cited as "App. at __."). The court stated that whether the date is July 27th or July 20th is unimportant because both dates are after the May 31, 1996 Notice and Demand. S.A. at 34.

After 28 months of litigation, Judge Nordberg granted Hunt's motion for summary judgment. S.A. at 38. Shortly thereafter, Hunt filed a motion for attorneys' fees and costs, which, pursuant to ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1), may be awarded to either party in the court's discretion. S.A. at 03.

On September 24, 1999, Judge Nordberg found that attorneys' fees and costs were warranted. S.A. at 19. First, the court stated that it "has the discretion to grant Hunt, who indisputably was the prevailing party, reasonable attorneys' fees." S.A. at 16. The district court found that fees were warranted under both the "five factor" test and the "substantially justified" test because Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. S.A. at 17. The court found that Central States' initial culpability was exacerbated by its continued insistence on not terminating the case and re-issuing a valid notice and demand. S.A. at 17-18. In an effort to avoid the argument that it prematurely issued the notice, Central States also contradicted its own affidavit concerning the issue of the withdrawal. S.A. at 18, fn. 1. Simply stated, Central States could have terminated this case and re-issued a valid notice and demand. S.A. at 18. The court found that an award of attorneys' fees will serve to deter such culpable behavior. *Id.* Judge Nordberg also dismissed Central States' argument that the arbitrator and Judge Shadur concluded that Hunt was liable for final withdrawal liability by noting different concerns are at issue between interim and final withdrawal liability. *Id.*

On February 28, 2000, this Court in a *de novo* review, affirmed Judge Nordberg's order and reasoning in granting Hunt's motion for summary judgment. S.A. at 20-26. The Court of Appeals noted at the end of its opinion that Central States easily could have corrected its initial premature notice for demand by issuing a second timely notice: "Why didn't Central States save everyone a big headache and pursue this course of action a long, long time ago?" *Central States Pension Fund v. Hunt Truck Lines, Inc.*, 204 F. 3d 736, 743 (7th Cir. 2000). S.A at 26.

Hunt then filed its second fee request with the district court, which sought fees relating to the appeal and to the preparation of the first two fee requests. S.A. at 04. Central States argued that the fees and costs associated with both the appeal and the preparation of the fee requests were unreasonable and excessive. S.A. at 08. With regard to attorney fees associated with the second fee request, the court stated that it need not address most of Central States' objections because Hunt agreed to reduce its request to account for Central States' objections. S.A. at 09. As to costs, however, the court held that secretarial overtime and certain other costs were not justified. *Id.* With many modifications, the court noted that Hunt's second fee request has been reduced by almost $20,000.00. S.A. at 10. Further, the court reduced the attorney fee award by an additional $10,000.00. S.A. at 11. This resulted in a reduction of approximately 25% of the fees related to the second fee request. *Id.*

Finally, Central States filed a supplemental brief arguing that, although Hunt prevailed in the district court on interim withdrawal liability payments, it merely achieved a "pyrrhic victory" because Central States will recover final withdrawal liability payments from Hunt. S.A. at 12. The court was not persuaded by this argument and noted Central States was re-arguing a point already decided by the court: whether Central

States' position was substantially justified. *Id.* The court found that Central States was overlooking the important distinction it had already made several times between the separate questions of interim and final withdrawal liability. *Id.* The court stated that even if Hunt loses on the question of final withdrawal liability, it does not mean that Hunt was not the prevailing party on interim liability. *Id.* Lastly, regarding Hunt's third fee request, the court reduced Hunt's request from $11,100 in attorneys' fees and $671.50 in costs, to $2,400 in fees and zero in costs. S.A. at 13-14.

SUMMARY OF ARGUMENT

This appeal is frivolous because Judge Nordberg rejected all of Central States' arguments to this Court, because Judge Nordberg clearly did not abuse his discretion, and because Central States' legal arguments are meritless and not well grounded in the law. Central States' argument that Hunt was not a prevailing party was rejected below. S.A. at 16, and 12. Central States' argument that its position was substantially justified was rejected below. S.A. at 17, and 12-13. Central States' argument that there were special circumstances was also rejected below. S.A. at 17, and 07, fn. 4. Finally, Central States' argument that Hunt's fees were unreasonable was rejected below. S.A. at 8-11.

In his September 24, 1999, decision, Judge Nordberg fully considered Central States' arguments, and analyzed the relevant tests for determining whether an award of attorney's fees is appropriate. S.A. at 16-17. Judge Nordberg's holding that Hunt was entitled to its attorneys' fees and costs was reasonable and not an abuse of discretion.

In his October 26, 2000, decision, Judge Nordberg scrupulously reviewed each of counsel's monthly billings and non-taxable costs, and analyzed the reasonableness of each. Judge Nordberg's award of attorneys' fees and costs to

Hunt was reasonable and not an abuse of discretion. Without entertaining an equally thorough factual review, this Court cannot overturn Judge Nordberg's decisions.

The real motivation for Central States' appeal is stated in Appellants' brief: "[i]f the award of attorney's fees to Hunt is upheld, Central States will have to pay money to Hunt even though Hunt refuses to pay the withdrawal liability that is due." Brief of Appellants at 19. However, the issue of Hunt's final withdrawal liability is before another court and not before this Court on this appeal. Central States continues to refuse to "own up" to its intransigent refusal to reissue a timely notice and demand as lamented in this Court's decision, and proceed in the proper statutory manner as directed by Judge Nordberg. S.A. at 26, 38. For these reasons, Judge Nordberg found that Central States' conduct in the underlying litigation was culpable. S.A. at 17-18.

Additionally, Central States' appeal of Judge Nordberg's award of attorneys' fees to Hunt is frivolous where Central States was a party to *Central States Southeast and Southwest Areas Pension Fund v. Nitehawk Express, Inc.*, 223 F.3d 483 (7th Cir. 2000), wherein this Court just last year held that an award of attorneys' fees to the prevailing party in an interim payments case is justified and within the district court's discretion despite the ultimate outcome of the withdrawal liability case. For these reasons, this Court should issue an immediate decision affirming Judge Nordberg's order.

ARGUMENT

I. JUDGE NORDBERG'S DECISION WAS NOT AN ABUSE OF DISCRETION.

This Court reviews a district court's decision to award attorneys' fees for an abuse of discretion. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000). This Court has held that "[a]n abuse of discretion generally only occurs where no reasonable person could take the view adopted by

the trial court. . . . If reasonable persons could differ, then the appellate court will not be able to find an abuse of discretion." *Libby v. Illinois High School Ass'n*, 921 F.2d 96, 98 (7th Cir. 1990) (emphasis added) (citing *Munson v. Friske*, 754 F.2d 683 (7th Cir. 1985); *see also Little v. Cox's Supermarkets*, 71 F.3d 637 (7th Cir. 1995).

This Court has found that it owes a high degree of deference to a district court's determination of whether to award attorney's fees for three reasons:

> First, the district court has a "superior understanding of the litigation and [we] desir[e to] avoid [] frequent appellate review of what are essentially factual matters." Second, the need to achieve uniformity in attorney's fees awards is not so compelling as to justify a high level of scrutiny. Finally, deference assists us in avoiding satellite litigation solely on fees.

Miller v. Artistic Cleaners, 153 F.3d 781, 784 (7th Cir. 1998) (emphasis added) (inner citations omitted); *see also Estate of Borst v. O'Brien*, 979 F.2d 511, 514 (7th Cir. 1992) ("We can think of few matters more wasteful of judicial resources than ancillary litigation over an attorneys' fee award.").

Attorney's fee awards are difficult determinations that are entrusted to the district court's discretion. *Cox's Supermarkets*, 71 F.3d at 645. Therefore, this Court has recognized that, "[u]nder this standard of review we will uphold any exercise of the district court's discretion that could be considered reasonable, even if we might have resolved the question differently ourselves." *Dhlamini v. AMR Corp.*, No. 98-3887, 2000 U.S. App. LEXIS 11851, at *5 (7th Cir. May 25, 2000) (emphasis added) (Court affirmed district court's award of attorney's fees).

Therefore, even if this Court were to find for Central States on any of the legal issues, it must also determine that no

reasonable person could have taken the view of Judge Nordberg in order to reverse on an abuse of discretion standard. This it simply cannot do.

II. HUNT WAS THE PREVAILING PARTY BEFORE JUDGE NORDBERG ON CENTRAL STATES' CLAIM FOR INTERIM WITHDRAWAL LIABILITY PAYMENTS AND THERE ARE NO SPECIAL CIRCUMSTANCES THAT WOULD WARRANT OVERTURNING JUDGE NORDBERG'S AWARD OF ATTORNEYS' FEES TO HUNT.

ERISA provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1) (emphasis added); *see also Miller v. United Welfare Fund*, 72 F.3d 1066 (2nd Cir. 1995). It has been established that "the district court also entertains a 'modest presumption' that prevailing parties are entitled to a reasonable attorney's fee." *Cox's Supermarkets*, 71 F.3d at 645, citing *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820 (7th Cir. 1984) (emphasis added). However, this Court has also found that this presumption may be rebutted if "special circumstances make an award unjust." *Bittner*, 728 F.2d at 830.

Judge Nordberg had discretion to award attorneys' fees to Hunt regardless of its prevailing party status. 29 U.S.C. § 1132(g)(1). Nevertheless, Central States has attacked Hunt's prevailing party status claiming that Hunt has achieved only a pyrrhic victory. Brief of Appellants at 14. It is indisputable, however, that Hunt was the prevailing party in the case before Judge Nordberg, and there are no special circumstances that would warrant overturning the award of attorneys' fees to Hunt.

A. Hunt Was Indisputably The Prevailing Party In The Interim Payments Case.

On January 12, 1999, Judge Nordberg granted Hunt's Motion for Summary Judgment and denied Central States' cross-motion. S.A. at 38. In the district court's September 24, 1999, order holding that Hunt was entitled to its attorneys' fees and costs, Judge Nordberg noted, "[t]his court has the discretion to grant Hunt, who indisputably was the prevailing party, reasonable attorneys' fees." S.A. at 16 (emphasis added). Furthermore, Judge Nordberg found that, "even if Hunt ultimately loses on the question of final withdrawal liability, that does not mean that it was not the prevailing party with regard to the question of interim withdrawal liability." S.A. at 12.

This Court has noted, "[a] party prevails if it 'gets substantial relief . . . even if it doesn't win on every claim.'" *Parker v. AH&L, Inc.*, No. 99-2679, 2000 U.S. App. LEXIS 5040, at *5 (7th Cir. Mar. 23, 2000). In the case before Judge Nordberg, Hunt obtained the precise relief it was seeking: a finding that Central States was not entitled to collect interim withdrawal liability payments because it had violated MPPAA's jurisdictional and procedural prerequisites. It is indisputable that Hunt was the prevailing party in the case before Judge Nordberg.

Further, Central States cannot characterize Hunt's victory as *de minimus* because Judge Nordberg's decision will significantly impact future MPPAA cases, and will deter future MPPAA violations and culpable conduct by pension funds. S.A. at 18. More importantly, Central States' argument is irrelevant because this Court has recognized that actions to collect interim withdrawal liability payments are entirely separate from an arbitrator's determination on the merits of withdrawal liability. *Nitehawk Express, Inc.*, 223

F.3d at 496. In *Nitehawk Express*, to which Central States was a party, this Court held:

> . . . an interim payment order [is] a *final* order on the limited issue of which party gets to hold the stakes during an arbitration. . . . So the interim payment accomplishes a goal entirely different from the arbitration on the merits. As such, the Fund's victory in securing interim payments cannot be undone by a loss at the merits stage. Therefore, the district court did not have discretion to vacate the award of attorney's fees for [the interim payment] portion of the litigation.

223 F.3d at 496 (emphasis added). This Court's holding in *Nitehawk* is exactly on point in this case, and this Court must affirm Judge Nordberg's award of attorney's fees to Hunt in the interim payments case, regardless of Central States' ultimate success on the merits in arbitration. Even if the Court disagrees with Judge Nordberg's decision, this Court cannot find an abuse of discretion because a reasonable person could have found as Judge Nordberg did. *See Libby*, 921 F.2d at 98; *see also Dhlamini*, 2000 U.S. App. LEXIS 11851, at *5.

B. There Are No Special Circumstances That Would Warrant Overturning Judge Nordberg's Award of Attorneys' Fees To Hunt.

In its brief, Central States claims: (1) that the underlying merit of its withdrawal liability assessment and (2) Hunt's non-payment of withdrawal liability to Central States are "special circumstances" that make an award of attorneys' fees to Hunt inappropriate. Brief of Appellants at 18 and 19.

With respect to Central States' first claim, this Court has recognized that actions to collect interim withdrawal liability payments are entirely separate from an arbitrator's determination on the merits of withdrawal liability. *See Nitehawk*

Express, Inc., 223 F.3d at 496. Therefore, this Court must affirm Judge Nordberg's award of attorney's fees to Hunt in the interim payments case, regardless of the ultimate merit of Central States' withdrawal liability assessment.

With respect to Central States' second claim, Judge Nordberg noted:

> What Central States really seems to be complaining about is the fact that Hunt has continued to resist liability for withdrawal payments in the case before Judge Guzman. . . . That is a matter before Judge Guzman and, as we have said, is separate from the issue that was before this court.

S.A. at 12-13. Therefore, there are no special circumstances that would warrant overturning the award of attorneys' fees to Hunt. Moreover, Judge Nordberg found that Central States' complaint for interim withdrawal liability payments was not brought in good faith, but rather that:

> . . . Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. The initial culpability was exacerbated by the continued insis tence on this position in this litigation. Simply stated, Central States could have terminated this case and re-issued a valid notice and demand. An award of attorneys' fees will serve to deter such culpable behavior . . ."

S.A. at 17-18. Central States' position in the underlying litigation before Judge Nordberg was blameworthy and not in good faith. Thus, this court should affirm the award of attorneys' fees to Hunt. Additionally, even if the Court disagrees with Judge Nordberg's decision, it cannot find an abuse of discretion because a reasonable person could have found as Judge Nordberg did. *See Libby*, 921 F.2d at 98; *see also Dhlamini*, 2000 U.S. App. LEXIS 11851, at *5.

II. HUNT IS ENTITLED TO ITS REASONABLE ATTORNEYS' FEES BECAUSE CENTRAL STATES' INTERIM PAYMENTS COMPLAINT BEFORE JUDGE NORDBERG WAS NOT SUBSTANTIALLY JUSTIFIED.

In its brief before this Court, Central States argues that its litigation position in the case before Judge Nordberg was substantially justified because Central States had relied on a Sixth Circuit opinion that found Central States was entitled to interim withdrawal liability payments notwithstanding the fact that Central States' notice and demand to the employer in that case was premature in that it was issued prior to the employer's withdrawal. Brief of Appellants at 11 and 17, citing to *Marvin Hayes Lines, Inc. v. Central States Pension Fund*, 814 F.2d 297 (6th Cir. 1987). However, Central States did not rely on *Marvin Hayes* even once in its briefs before Judge Nordberg in support of its motion for summary judgment prior to his decision on January 12, 1999, granting Hunt's motion for summary judgment. App. at pages 12-22, 104-109, 172-176, and 307-317. Moreover, Central States did not rely on *Marvin Hayes* in its any of its briefs filed prior to Judge Nordberg's September 24, 1999, order, finding Hunt was entitled to its attorneys' fees and costs. Record on Appeal item numbers 91, 104, and 116 (hereinafter "Record item __.").

In fact, Central States first proposed this theory of reliance on *Marvin Hayes* in a supplemental memorandum filed on June 8, 2000, after Judge Nordberg had issued his September 24, 1999, order holding that Hunt was entitled to its attorneys' fees and costs. Record item 124. Therefore, Central States' claims are absolutely false: Central States' did not rely on *Marvin Hayes* in the interim payments litigation, and did not rely on *Marvin Hayes* in the attorneys' fee litigation before Judge Nordberg prior to his September 24, 1999, order finding that Hunt was entitled to attorneys' fees. Central States' penchant for insisting on indefensible posi-

tions in this litigation (S.A. at 17-18) and then misrepresenting its original position in this appeal (Brief of Appellants at 11 and 17) is grossly improper and reprehensible.

Central States also claims that its interim payments complaint and litigation position before Judge Nordberg were substantially justified because it had relied on *Trustees of the Chicago Truck Drivers Union Pension Fund v. Rentar Indus., Inc.*, 951 F.2d 152 (7th Cir. 1991) and *Trustees of the Chicago Truck Drivers Union Pension Fund v. Central Transport, Inc.*, 935 F.2d 114 (7th Cir. 1991). However, in his decision, Judge Nordberg correctly determined that Central States' position was not substantially justified after analyzing the issues using the two tests espoused by this Court. Judge Nordberg accurately cited the two tests used in this Circuit to determine whether reasonable attorneys' fees should be awarded in this context: the "five factor" test and the "substantially justified" test. S.A. at 16-18; *see also Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 128 (7th Cir. 1991). Judge Nordberg also noted that this Court has stated that "[w]hichever approach is used, the bottom-line question is essentially the same: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" S.A. at 17; *see also Meredith*, 935 F.2d at 128.

In holding that Hunt was entitled to its attorneys' fees and costs, Judge Nordberg found:

> Under both of these tests ["five factor" test and "substantially justified" test] this court finds that Hunt should receive reasonable attorneys' fees. . . . This court finds that fees are warranted largely because Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. The initial

culpability was exacerbated by the continued insistence on this position in this litigation.

S.A. at 17-18; *see also Parker v. AH&L, Inc.*, No 99-2679, 2000 U.S. App. LEXIS 5040, at *5-6 (7th Cir. Mar. 23, 2000) (Court found no abuse of discretion where judge considered relevant tests). Judge Nordberg fully considered the relevant tests for determining whether to award attorney's fees. Even if this Court disagrees with Judge Nordberg's decision, it cannot find an abuse of discretion because a reasonable person could have found as Judge Nordberg did. *See Libby*, 921 F.2d at 98; *see also Dhlamini*, 2000 U.S. App. LEXIS 11851, at *5.

III. JUDGE NORDBERG'S AWARD OF ATTORNEYS' FEES TO HUNT WAS REASONABLE AND BALANCED.

The amount of attorneys' fees awarded to Hunt was reasonable. Altogether, Judge Nordberg reduced Hunt's fees and costs by about $40,000 after reviewing hundreds of pages of invoices. S.A. at 6, 10-11, 13-14. In its October 26, 2000, order awarding Hunt its attorney's fees and costs, Judge Nordberg noted that in Hunt's first fee request, non-taxable costs were discounted by 80 percent in the months in which counsel billed for the Nordberg litigation to discount for the possibility of including any costs attributable to the litigation before Judge Shadur. S.A. at 04. Judge Nordberg ultimately reduced Hunt's first request by $1,116.73. S.A. at 06. In addition, Judge Nordberg reduced Hunt's second fee request by almost $20,000. S.A. at 10. Further, Judge Nordberg also reduced the second fee request by an additional $10,000 in response to Central States' general objection that the overall amount was too much. S.A. at 11. Finally, Judge Nordberg reduced Hunt's third fee request from $11,100 to $2,400, and disallowed $671.50 in non-taxable costs. S.A. at 13-14.

Judge Nordberg substantially reduced Hunt's fee requests; therefore, the award was more than reasonable and Judge Nordberg did not abuse his discretion. This Court cannot substitute its decision for the diligent review and analysis conducted by Judge Nordberg in granting the attorneys' fees and costs at issue here. Furthermore, even if the Court disagrees with Judge Nordberg's decision, it cannot find an abuse of discretion because a reasonable person could have found as Judge Nordberg did. *See Libby*, 921 F.2d at 98; *see also Dhlamini*, 2000 U.S. App. LEXIS 11851, at *5.

CONCLUSION

Judge Nordberg did not abuse his discretion when he determined that Hunt was the prevailing party and that there were no special circumstances that would rebut the presumption that Hunt is entitled to its reasonable attorneys' fees and costs. Judge Nordberg considered Central States' culpable conduct under the relevant tests to determine whether an award of attorney's fees was appropriate, and held that under both tests Hunt was entitled to attorneys' fees and costs. This Court recently held that ". . . we will uphold any exercise of the district court's discretion that could be considered reasonable, even if we might have resolved the question differently ourselves." *Dhlamini*, 2000 U.S. App. LEXIS 11851, at *5.

For all of the foregoing reasons, no oral argument is required here, and this Court should affirm Judge Nordberg's judgment of October 31, 2000.

Respectfully submitted,

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